No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Allen Payne
Debra Payne *Petitioner(s)*

v.

United States of America *Respondent(s)*

On Petition For Writ of Certiorari
To the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Allen Payne
Debra Payne

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Kansas City, MO 64151
816-584-0910

Questions Presented for Review

i The Court of Appeals Judges from the 8th Circuit, Hansen, Smith, Melloy state in the remand of March 2003, that the claim is about failure to diagnose and treat the condition of anetoderma. Why are the records of November 1989 silent of any treatment of this condition after it was documented as anetoderma after biopsy?

ii If the doctor never discussed the true diagnosis, and therefore told the patient he has a different condition, isn't the doctor in violation?

iii If the doctor was aware that the Veteran was seeking compensation for a condition and the plaintiff was not at fault of his own due to

fraud and concealment by relying on a professional. Why didn't he refer the plaintiff to a more competent doctor? Was it not his duty?

iv Regarding the summary judgment motion of December 2003, is it true according to the laws? The moving party has to establish a right to a summary judgment without controversy.

v Is it correct that if the records on file contain two plausible, but contradictory statements of essential facts, any evidence presented will defeat the moving parties Primie Facie showing in a summary judgment? The December 2003, motion for judgment has incorrect definitions of the Plaintiffs condition and are controversial from the Defendants medical dictionary.

vi The remand of March 2003, stated the claim is not about agent orange and it mentions the year 1967-1970, which the Plaintiff states in his letters of April 1991. All information speaks to chemical exposure. Why in May 1991, the Defendant states that the Plaintiff does not have any condition at all? Anetoderma nor connective tissue nevi.

vii The final judgment given on October 13, 2004, by the 8th Circuit states on page 2, that the Plaintiff is seeking increased benefits. Is this not in conflict of the judgment? This case was filed a malpractice and failure to diagnose in the year 2000.

viii Is it not correct that a District Court should consider factual information given by the Plaintiff? If so, why didn,t the factual information prevail ?

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STATEMENT OF JURISDICTION

THE FINAL JUDGEMENT OF THE UNITED STATES COURT OF AND FOR THE EIGHTH CIRCUIT WAS BASED ON 28 U.S.C. 2401 (B) ENTERED ON OCTOBER 13, 2004

STATEMENT OF THE CASE

In November 1989, the plaintiff went to the veteran s hospital-seeking help for a condition, which he was told to him at that time it was connective tissue nevi. In addition the doctor did not tell the plaintiff the true condition after biopsy, which was anetoderma, where there is a day and night difference from the connective tissue nevi.

As we look at the medical records of that day we see that the true diagnosis is documented, but was never treated from the onset, the plaintiff sought out his own doctor, Dr. Hall whom states that anetoderma is a nexis and could be connected to agent orange. The veteran sent letters of April 1991, in support of his claim for compensation.

The defendant sent the plaintiff to Columbia, Missouri for a physical with its own dermatologist, Dr. Karen Zanol, whom states that the plaintiff has a wide spread condition to the body with anetoderma. One of the treatments that the defendants own doctors have the plaintiff on is a cream called Retin A, a chemical peel, 800 mg Ibuprofen.

In May 1991, the plaintiff received a letter stating, after he filed a claim for compensation, he did not have a condition at all (Connective tissue nevi, nor anetoderma).

The Eighth Circuit reversal in part for remand of March 7, 2003, the court states we quote: in addition, because the Veterans Administration allegedly negligent failure to diagnose and treat Allen s anetoderma occurred well after he was discharged from active military service, his malpractice claim regarding the VA doctors 1989- 1990 diagnosis and treatment of his injury, unlike his claim that he was incurred by exposure to agent orange while on active duty in Vietnam is not barred by feres United States v. Brown 348 U.S. 110, 112.

REASONS FOR GRANTING THE WRIT

The eighth circuit has stated and emphasized the nature of the summary judgment remedy, it should not be granted unless the moving party has established to the judgment with such clarity as to leave no room for controversy, Snell vs. United states 680 f. 2*° 545,547 (8™ cir).

In a opinion by the 8™ circuit that the anetoderma or misdiagnosis could be prevalent, the facts are the defendant concealment of material facts after the biopsy it is the 1989-1990 diagnosis which caused a condition to worsen, such a fraudulent act prevents the plaintiff from discovery by reasonable diligence the true basis of the claim dimminnie vs. United States 728 f. 2nd 301,305,306 6™ (cir) this action should not be barred by 28 usc 2401 (b)

In Holmberg vs. Armbrecht 327 u.s. 392 (1946) see f. 3™ at 1067 the bar, of the statue does not begin to run in fraud and concealment when the plaintiff is in ignorance or fault or want or diligence or care on his part until the fraud and concealment is discovered u.s. 397 the second of torts, the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong so the plaintiff is forced to rely upon what is told to him by the doctor or the surgeon. Second of torts 899 comment e (1979)

there is a negligent act that worsened the condition because the act increased susceptibility u.s. Anderson 669 a 2nd del (1995).

A competent doctor should have known the treatment that should have been prescribed for the plaintiff after biopsy, the defendant was aware that the plaintiff was seeking a compensation from his employer as in Kubrick 444 u.s. 111,123, the diagnosis was incorrect from the beginning, in addition a failure to communicate the true diagnosis Missouri statue 516.105, and also should have referred the plaintiff to a more competent Doctor Weiss 975 s.w. at 120.

We also must state that the defendant breached his duty to treat the plaintiff he only states that the doctor may have or may not have misdiagnosed the plaintiff. We contend that the duty was owed to the plaintiff from the defendant Gooding vs. University hospital 445 so 2nd 1015 (fia 1984).

In his summary judgment request of December 15 2003, the defendant emphatically states with out error that the plaintiff has nevus using his Dorland s dictionary 1135 (28™ edition), his pathology reports states the plaintiff has connective tissue nevus, the problem is the condition the plaintiff has is anetoderma which is confirmed by the plaintiffs doctor,

and the defendants doctor, the defendant makes reckless statements with definitions that would help him prevail in a summary judgment Andrews vs. Mohawk rubber 474 supp 1276 1283 (w.d.) 1979).

We state that if the records contain competent materials that evidence two plausible, but contradictory statements of essential facts, any evidence presented that demonstrates a genuine issue of material facts will defeat the moving party s primie facie showing in a summary judgment it Commercial vs. Mid marine 854 s.w.2nd at 381.

We also believe that the plaintiff can represent himself or demonstrate negligence of an act to diagnose and treat property through his medical records, Betzold vs. Sherwin 404 n.w. 2nd 286-288 (minn ct app 1987).

In addition the facts shows, that the plaintiff was not given the benefit of the doubt of the factual information from Washington University Medical Center 761 s.w. 2nd 688, 689, mo app. E.d. (1988).

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ALLEN PAYNE,et al.,	)	
	)	
Plaintifs,	)	
v.	)	Case No.
01-0575-CV-W-NKL		
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

ORDER

Pending before the Court is Defendant United States of America's Motion for Summary Judgment [Doc. # 43]. For the reasons stated below, the motion will be granted. Also, pending is the Plaintiffs Alien Payne ("Payne") and Debra Payne's Motion for Summary Judgment [Doc. # 44]. However, this appears to be a response to the Defendant's motion for summary judgment. Even if this is a motion for summary judgment, the motion would be denied as moot given the Court's conclusions on the Defendant's motion.

I. Factual Background

Solely for the purpose of the Defendant's summary judgment motion, the Court views the facts in a light most favorable to the Plaintiffs, accepting as true the Plaintiffs' version of the facts when they are disputed.

A. Procedural Background

The Paynes filed their *pro se* civil complaint on June 1, 2001. In its April 30, 2002 Order the Court granted the Defendant's Motion to Dismiss the Plaintiffs' various claims. In a March 18, 2003, Order, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the challenge to the Veterans Administration's denial of their disability benefits. The Eighth Circuit reversed the dismissal of the medical malpractice claims and remanded the case for further proceedings. In deciding to remand the case regarding Plaintiffs' malpractice claims the Eighth Circuit panel stated, "[T]he existing record does not

establish whether Allen exercised reasonable diligence in discovering the probable cause of his injury, and this issue remains open on remand."

B. Factual Background

On November 15, 1989, Mr. Payne went to the St. Louis Veterans Administration Medical Center ("VAMC") for an outpatient visit. (Ex. 4 at pp. 40-41.) His main complaint was a rash on the trunk of his body. (Ex. 4 at pp. 40-41.) The rash had persisted over the previous two months. (Ex. 4 at pp. 40-41.) He was sent to the dermatology clinic for a consult.

On December 27, 1989, he went to the dermatology clinic. (Ex. 4 at pp. 40-41.) The notes for this visit indicate a five-month history of pruritic (itching) truncal eruption which was not preceded by an illness. Also noted was the absence of a dermatological condition in the past. Under the Assessment/Plan part of the dermatology consult, the

following remarks appear: "Papular eruption of unknown etiology. 'Loose' nature of skin in affected areas suggestive of anetoderma or other connective tissue process, though eruptive nature and distribution very atypical. Return to clinic in one week, at 0730 with Dr. Eisen." (Ex. 4 at p. 41.)

On January 3, 1990, Payne returned to the dermatology clinic. (Ex. 4 at pp. 43-44.) He was initially examined by dermatology resident, Dr. Karen E. Forsman, who worked under the supervision of Dr. Arthur Z. Eisen. (Ex. 4 at pp. 43-44.) During this visit Dr. Forsman noted a six to seven month history of generalized truncal eruption, mildly pruritic. (Ex. 4 at pp. 43-44.) Additionally during this visit, a "punch" biopsy was performed to obtain a pathological assessment of the affected area. (Ex. 4 at pp. 43-44.) The pathology diagnosis was "punch biopsy skin from left flank-consistent with connective tissue nevus, no

evidence of granulomatous process." (Ex. 4 at p. 39.) Dr. Forsman wrote on her notes, "Return to Clinic in 2 weeks. To see Dr. Eisen 7:30 a.m." (Ex. 4 at p. 44.)

On January 17, 1990, Payne returned to the dermatology clinic. Dr. Forsman's note acknowledges the pathology findings and further states: "Biopsy site healing well. Suture removed. Ash leaf macule noted on right chest. Discussed case with Dr. Eisen. Possibly from tuberous sclerosis with connective tissue nevi and ash leaf macule. Unlikely however as patient is otherwise normal; 3 children normal. No other family members involved. Return to Clinic 4 month for recheck." (Ex. 4 at pp. 44-43.)

Payne's next scheduled appointment at the dermatology clinic was May 18, 1990. Payne cancelled this appointment. (Ex. 4 at p. 45; Payne Dep. at p. 11.) At some point during Payne's visits to the dermatology clinic, Dr. Eisen recommended that Payne use an over the counter

soap, Neutrogena, to help stop the itching. (Payne Dep. at p. 9.)

Following Payne's cancellation of his appointment, there is no VA medical record addressing Payne's skin condition between May 18, 1990, and Dr. Karen Zanol, VA Compensation and Physical Examination on November 2, 1998. (Ex. 4 at pp. 34-36.) Payne did not seek any medical care regarding his skin condition between his last visit to the dermatology clinic in January 1990 and November 1998. (Payne Dep. at p. 12.)

In February 1991, Payne filed a claim for veteran's benefits due to his skin condition. (Ex. 5.) In an effort to support this claim for benefits, Payne submitted a statement on April 1, 1991. The letter follows:

> I Allen Payne entered the Veterans Administration Hospital on Grand Ave. for Agent Orange Exposure on 12-27-89. and was seen by V.A. Doctors for a rash that has been on my body from waist upward front

and back, since my return from Viet Nam. i returned on 3 different occasions for review of this rash at the V.A. Hospital but there was nothing they could give me to clear this rash up because they have never seen anything like this before ever. therefore i am stuck with this body rash and can do nothing about it. the only thing the V.A. Hospital did was give me some Soap to stop the itching, however this Soap has no effect on the rash, the only thing that was said was to come back from time to time to let them look at it. i have been in Viet Nam were this Chemical was sprayed the years of 1967-1970 I've been in Da Nang, Saigon, Cam Rahn Bay, Cambodia so 4 yrs on and off in these areas, i also receive a once ayear payment from the Agent Orange Fund for Veterans that have been in the exposed areas. I've also taken a Physical at the V.Z. Hospital, Blood test, Chest X rays and so on. in reference to the the areas that i've been in that i was exposed
to the Herbicide i was with HC-1 Helicopter Rescue, which rescued down pilots on Sea and Land, or whereever we can pick them up. i felt that i should report this to the Dept. of Veterans Affairs in hopes that it would be helpful in making a decision in filing of this claim, for this is a Chronic Disability, something that will be with me for the rest of my life, and is related to Serve.

(Ex. 6.)

In 1998, Payne had his skin condition examined by a private physician who is a dermatologist in Kansas City, Missouri, Dr. John Hall. (Payne Dep., pp. 12-13). According to Payne, Dr. Hall recommended a skin cream that was ineffective. The only document Payne produced regarding this visit is a September 14, 1998, letter from Dr. Hall. The letter states:

> A lesion from his right back was taken for skin biopsy on that day [August 26, 1998] and found to be anetoderma. From his past history, I do feel it's possible that exposure to Agent Orange, while in Viet-nam could have given him chloracne, which in turn could have given him anetoderma. Chloracne is a proven side effect of Agent Orange use.

(Ex. 7.) Payne only saw Dr. Hall once and only talked to him since the visit to ask for the letter. (Payne Dep. at p. 14.)

On November 2, 1998, VA Dermatologist, Dr. Karen Zanol, examined Payne. (Ex. 4 at p. 36.) In her

Assessment and Plan, she noted: "Wide spread anetaderma biopsy proven. This is a post-inflammatory form that can be caused by acne from eruptions such as chloracne which could have been a predisposing condition in this veteran. Plan: I would give him triamcinolone 0.025 percent cream in a one pound jar to use for his itching." (Ex. 4 at p. 36.) Since this appointment with Dr. Zanol, Payne has not seen any physician regarding his skin condition. (Payne Dep. at p. 15.) He receives his prescription by mail. (Payne Dep. at p. 15.) Payne states that the cream helps lessen the itching.

All of the doctors that have examined Payne's skin condition have concluded that it is a chronic, untreatable skin condition and have recommended soaps or creams to relieve the itching.

II. Summary Judgment Standard

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant who moves for summary judgment bears the burden of showing that there is no genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). When considering a motion for summary judgment, a court must scrutinize the evidence in the light most favorable to the nonmoving party and the nonmoving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). The main purpose of a motion for summary judgment is to identify factually unsupported claims. If a plaintiff has the burden of proof at trial on a claim and the defendant has

filed a motion for summary judgment, the plaintiff must identify admissible evidence sufficient to make a submissible case at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986). If the plaintiff cannot identify such facts, the defendant is entitled to judgment as a matter of law. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 884 (1990) (quoting *Celotex,* 477 U.S. at 322)).

To establish a genuine issue of fact sufficient to warrant trial, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing there is a genuine issue for trial. *Anderson,* 477 U.S. at 248.

III. Discussion

The Defendant asserts two grounds for summary judgment on Payne's medical malpractice claim. First, Payne's action is barred by the two year statute of

limitations applicable to actions filed under the Federal Tort Claims Act ("FCTA"). Second, summary judgment should be granted on the claim because Payne has not set forth a *prima facie* case. Specifically, Payne cannot show that any VA physician violated the applicable standard of care in diagnosing and treating Payne's skin condition. Payne argues that the statute of limitations has not accrued because of fraud and concealment on the Defendant's behalf. Also, Payne reasserts that the VA physician was negligent and that the physician should have given him further medical attention to prevent injuries.

A. Statue of Limitations

The general rule for claims under the FTCA is that a claim accrues at the time of the plaintiff's injury. *Osborn* v. *United States*, 918 F.2d 724, 731 (8th Cir. 1990). There is an exception, however, for medical malpractice claims. *Id.* (holding that FTCA action for malpractice accrued for statute of limitations purposes when the plaintiff learned from physicians that prior medical treatment could have

caused injury). This is because in medical malpractice cases the injury and the cause are not immediately known. *Id.* For medical malpractice claims under the FTCA, a claim accrues when the plaintiff discovers, or should have discovered, both the injury and its cause. *United States v. Kubrick,* 444 U.S. 111, 122-24 (1979) (holding that FTCA claim for medical malpractice accrues when plaintiff becomes aware of injury and its probable cause. The plaintiff must exercise reasonable diligence in discovering the injury and its probable cause).[1]

In its order on remand, the Eighth Circuit stated that the claim is not barred if, despite exercising reasonable diligence, Payne did not discover the probable cause of his injury until August 1998 when Dr. Hall, a private physician, diagnosed him.

Payne is arguing that Dr. Eisen committed medical malpractice by not correctly diagnosing, treating, and curing his skin condition in 1990. Payne testified that Dr. Eisner told him the soap should "cure" his skin condition.

[1]The Plaintiffs argue that the Defendant is precluded from raising a statute of limitations defense because the Defendant concealed material facts, such as concealment of fraud. The Court rejects this argument because the Plaintiffs have presented no evidence of a fraud, conspiracy, or any material facts that the Defendant concealed. The Plaintiffs seem to argue that a "fraud" was a diagnosis by the VA physicians in 1990 with which the Plaintiffs disagree. While the physicians may have wrongly diagnosed Payne, that is presumably relevant to the underlying medical malpractice claim and not a fraud that would toll the limitations period.

By 1991, Payne was aware of the acts he alleges injured him and constitute medical malpractice. *(See* Ex. 6.) He knew that Dr. Eisen only prescribed a soap to alleviate his skin condition and that he did nothing else. He knew this promised cure did not work. He knew that he had stopped seeing Dr. Eisen. Payne wrote, "[T]here was nothing they [the VA physicians] could give me to clear this rash up because they have never seen anything like this before ever. [T]herefore[,] [I] am stuck with this body rash and can do nothing about it. [T]he only thing the V.A. Hospital did was give me some [s]oap to stop the itching. [H]owever[,] this

[s]oap has no effect on the rash."[2] (Ex. 6.) Payne expressed his opinion that the treatment the VA provided him was ineffective in
1991. It is this failed treatment from which he alleges medical malpractice. The Court concludes that the record shows Payne knew of his injury and its cause when he wrote the 1991 letter. Thus, the limitations period began to run in 1991.

Even if Payne did not know his injury and the cause of the injury in 1991, the record shows that Payne, using reasonable diligence, should have discovered his injury long before 1998. The record shows that Payne never asked any physician about his skin condition until 1998. Payne cancelled his last appointment with Dr. Eisen.[3] Payne

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[2]In the Plaintiffs' motion [Doc. # 44], Payne states for the first time that the document is invalid and written by a friend. However, this is in contrast to his deposition testimony when he stated that the letter was accurate. (Payne Dep. at pp. 16-17.)

[3]Payne also may be arguing that Dr. Eisen should have continued treating Payne and this failure caused him further injury. However, under Missouri law, a doctor's duty to attend to a patient continues so long as required unless the physician-patient relationship is ended by "(1) the mutual consent of the parties, (2) the physician's withdrawal after reasonable notice, (3) the dismissal of the physician by the patient, or (4) the cessation of the necessity that gave rise to the relationship." *Weiss v. Rojanasathit,* 975 S.W.2d 113, 119-20 (Mo. 1998). Here, Payne dismissed Dr. Eisen by cancelling his appointment and not rescheduling in direct contrast to the never rescheduled this appointment. The record includes notes from other doctors during this time and he was receiving regular treatment from the VA for his mental condition. But during this time Payne never mentioned his skin condition until 1998. And, yet, this is so even though Payne's skin condition did not improve and it was not cured. He knew he was dissatisfied with Dr. Eisen's treatment but made no inquiry for eight years. Moreover, the fact that the promised cure was not working should have prompted him to make further inquiry. *Garza v. United States Bureau of Prisons,* 284 F.3d 930, 934 (8th Cir. 2002) (noting that a claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, but the suspicion does

give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence). If, as the Eighth Circuit suggested, Payne did not discover his injury until 1998 when Dr. Hall examined him, the record shows that he did not exercise reasonable diligence in making the discovery.

Since Payne's medical malpractice claim under the FTCA accrued in 1991 and he did not file his tort claims until 1999 and 2000, this action is barred by the applicable two year statute of limitations. 28 U.S.C. § 240l(b) (requiring a claim to be presented in writing to the appropriate federal agency within two years after such claim accrues). Accordingly, the Court grants the Defendant's motion for summary judgment on Payne's medical malpractice claim.

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doctor's instruction to come back. *Id.* (holding that the physician-patient relationship was terminated when the plaintiff failed to return for the directed check-up).

B. No Expert Opinion to Make *Prima Facie* Case

Alternatively, the Defendant argues that the Plaintiffs have not made *their prima facie* case and, therefore, summary judgment should be granted on this ground as well. The Court agrees.

In a negligence medical malpractice case, a plaintiff must present evidence to establish the following: (1) a causal connection between the act or omission of the physician and the claim injury; (2) proof that the act or omission was negligently performed; and (3) proof that the physician failed to meet the requisite standard of care. *Cebula v. Benoit,* 652 S.W.2d 304, 307 (Mo. Ct. App. 1983); *see also Krause v. United States Truck Co.,* 787 S.W.2d 708, 710 (Mo. 1990) (holding that *aprima facie* negligence claim includes the following elements: existence of duty, a breach of the existing duty, and a resulting injury caused by the breach of the duty).

The Plaintiffs have failed to present evidence that Dr. Eisen failed to meet the requisite standard of care. Under Missouri law, evidence establishing the third element, standard of care, must be introduced by expert testimony. *Brooks v. SSM Health Care,* 73 S.W.3d 686, 692 (Mo. Ct. App. 2002); *Dine v. Williams,* 830 S.W.2d 453, 456 (Mo. Ct. App. 1992) ("Evidence establishing the standard of care in a medical negligence case must be introduced by expert testimony") (citations omitted). The Plaintiffs have no expert to establish the standard of care. Dr. Hall's letter does not address the standard of care. Rather, it discusses his dealings with Payne—he came in with lesions over his trunk, a skin biopsy found the lesions to be anetoderma-and his opinion that it is possible the lesions are due to exposure to Agent Orange. These two areas do not establish a

standard of care. The Court finds no other potential expert opinion establishing the standard of care in the record. Thus, the Plaintiffs have failed to set forth *aprima facie* case.

Even if Missouri law did not require an expert to establish the standard of care, the Plaintiffs have not presented sufficient evidence setting forth the standard of care.

Under Federal Rule of Civil Procedure 56(e), after a motion for summary judgment is made, the adverse party may not rest on the allegations. Instead, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *Id.* Further, if the adverse party fails to set forth specific facts, the court shall, if appropriate, enter summary judgment against the adverse party. *Id.* In this case, the Defendant moved for summary judgment based on the Plaintiffs' failure to provide evidence on the applicable standard of care. The Plaintiffs did not set forth specific

evidence laying out the standard of care. Rather, the Plaintiffs say that the medical records as a whole show the negligence. However, upon review of the entire record, the Court concludes that the medical records themselves do not show the required standard of care. The records show that Payne sought care for a skin condition. The VA physicians may or may not have misdiagnosed Payne. The VA physicians suggested that Neutrogena soap may cure the itching. This did not help. Yet, there is no evidence in the record that Payne even informed the VA physicians that the soap was not working or asked for another solution. Payne then cancelled his last appointment and never rescheduled. This record does not establish the standard of care for a doctor. In fact, the record hints otherwise. The two doctors that subsequently treated Payne only suggested solutions that may have lessened the itching. Both suggested creams. Dr. Hall's cream was ineffective while Dr. Zanol's cream lessened the itching. This suggests that the only solution for Payne's skin condition was a trial and error method of

finding the correct remedial measure, be that soap or cream, hat lessened his itching. The Plaintiffs have failed to set forth evidence going to the third element of the *prima facie* case—the standard of care. Accordingly, the Court grants summary judgment on Payne's medical malpractice claim on this ground as well.

C. Debra Payne's Claim

Debra Payne is asserting a claim for damages due to lack of consortium. This claim is derivative of her husband's claim. *Hens en v. Truman Med. Ctr., Inc.*, 62 S.W.Sd 549, 558 (Mo. Ct. App. 2001) ("A claim for loss of consortium depends for validity upon the claim of the spouse, from which it derives. If the injured person has no claim, then the spouse does not either.[11]). Because the Court has granted the Defendant's motion for summary judgment as to Payne's remaining claim and a spouse's claim for loss of consortium is derivative, Debra Payne's claim must be dismissed as well.

IV. Conclusion

Accordingly, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment [Doc. # 43] is GRANTED. It is further

ORDERED that the Plaintiffs Motion for Summary Judgment [Doc. # 44] is DENIED as moot.

s/Nanette K. Laughrey

NANETTE K. LAUGHREY
United States District Judge

Dated: March 22, 2004
Kansas City, Missouri

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-1831

Allen Payne; Debra Payne	)	
	)	
Appellants,	)	
	)	Appeal from the Unite
v.	)	District Court for the
	)	District of Missouri
United States of America,	)	
	)	
Appellee.	)	[UNPUBLISHED]
	)	

Submitted: October 7, 2004

Filed: October 13, 2004

Before MELLOY, HANSEN, and SMITH, Circuit Judges.

PER CURIAM.

Allen and Debra Payne appeal the district court's[1] adverse grant of summary judgment to the United States in

BEST AVAILABLE COPY

this medical malpractice action brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (FTCA). Upon de novo review, see Meyers v. Neb. Health and Human Servs, 324 F.3d 655, 658-59 (8th Cir. 2003), we agree that summary judgment was proper, because the undisputed evidence showed that Allen was or should have been aware of his injury and its cause no later than April 1, 1991, the date of a letter he sent to the Department of Veterans Affairs (VA),

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[1]The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

Seeking increased benefits, see Motley v. United States, 295 F.3d 820, 822 (8th Cir. 2002) (FTCA claim for medical malpractice accrues when plaintiff actually knew, or in exercise of reasonable diligence should have known, cause and existence of injury). Even if Allen did not actually know of the probable cause of his injury on that date, he would have discovered the probably cause in short order if he had

exercised reasonable diligence, and the undisputed evidence showed that he did not. See United States v. Kubrick, 444 U.S. 111, 123-24 (1979) (plaintiff has responsibility to seek advice in medical community once aware of harm and cause); Garza v. United States Bureau of Prisons, 284 F3d 930, 935 (8th Cir. 2002) (suspicions of claim give rise to duty to inquire into existence of claim in exercise of due diligence; determination of whether plaintiff acted reasonably is objective). Because Allen knew or should have known of his injury and its probable cause more than two years before January 1999, the Paynes' January 1999 and March 2000 administrative claims to the VA were untimely, and their action is barred. See 28 U.S.C. § 2401(b) (plaintiffs must file claim with federal agency within 2 years of accrual of tort claim). We agree with the district court that the Paynes did not show any basis for equitable tolling. Accordingly, we affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 04-1831

Allen Payne; Debra Payne Appellants, v. United States of America, Appellee.	)	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 30, 2004

Order Entered at the Direction of the Court:

" s/Michael E. Gans"

Clerk, U.S. Court of Appeals, Eight Circuit

Court of Appeal Judges

Hansen, Melloy, Smith

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2750

Allen Payne; Debra Payne	)	
	)	
Appellants,	)	
	)	Appeal from the Unit
v.	)	District Court for the
	)	District of Missouri
United States of America,	)	
	)	
Appellee.	)	[UNPUBLISHED]
	)	

Submitted: March 7, 2003

Filed: March 18, 2003

Before HANSEN, Chief Judge, MELLOY and SMITH,

Circuit Judges.

PER CURIAM.

Husband and wife Allen and Debra Payne appeal the district court's dismissal of their suit against the United States to recover disability benefits and tort damages from the Department of Veterans Affairs (VA). The Paynes' form complaint and attachments present the allegations that Allen was exposed to Agent Orange while on active duty in Vietnam; in 1989 a VA physician examined a rash that Allen had developed and recommended only that Allen clean it with soap; in 1991 the VA ruled that Allen's skin condition was not connected to his military service; in 1998 a private physician and another VA physician diagnosed Allen's skin condition as anetoderma; and in January 199 and March 2000 the Paynes filed administrative claims with the VA alleging that it had negligently failed to diagnose and treat Allen's anetoderma, which claims the VA rejected as untimely in May 2001.

On the government's motion, the district court dismissed the Paynes' suit, ruling that it lacked subject matter jurisdiction to review the denial of VA disability benefits; that the Paynes' tort claims were barred by the Federal Tort Claims Act's (FTCA's) two-year statute of limitations, see 28 U.S.C. ξ 2401(b) (plaintiffs must file

claim with federal agency within 2 years of accrual of tort claim); and that the tort claims were further barred by the Feres doctrine, see Feres v. United States, 340 U.S. 135 146 (1950) (FTCA does not waive government's sovereign immunity from actions brought by military personnel which arise out of or in the courts of activities incident to military service).

We review de novo the dismissal of the Paynes' complaint for lack of subject matter jurisdiction, see Bueford v. Resolution Trust Corp., 991 F.2d 481, 484 (8th Cir. 1993), but review for clear error any findings of fact regarding subject matter jurisdiction, see Appley Bros. V. United States, 164 F.3d 1164, 1170 (8th Cir. 1999). To the extent the Paynes challenge the VA's denial of disability benefits, we agree that the district court lacked subject matter jurisdiction. See Hicks v. Veterans Admin., 961 F.2d 1367, 1369-70 (8th Cir. 1992) (district court has no jurisdiction over challenge to VA's decision affecting benefits; such decisions can be reviewed only in exclusive appellate review scheme established by Veterans Judicial Review Act of 1988).

However, the district court erred in dismissing the Paynes' medical-malpractice claims. The Paynes' malpractices are not time-barred if, despite exercising reasonable diligence,

Allen did not discover the probable cause of his injury until August 1998 when he was diagnosed by a private physician. See United States v. Kubrick, 444 U.S. 111, 122-24 (1979) (FTCA claim for medical malpractice accrues when plaintiff becomes aware of injury and its probable cause; plaintiff must exercise reasonable diligence in discovering injury and its probable cause): Osborn v. United States, 918 F.2d 724, 732-34 8th Cir. 1990) (FTCA action for malpractice accrued for statute of limitations purposes when plaintiff learned from physicians that prior medical treatment could have caused injury). The existing record does not establish whether Allen exercised reasonable diligence in discovering the probable cause of his injury, and this issue remains open on remand. In addition, because the VA's allegedly negligent failure to diagnose and treat Allen's anetoderma occurred well after he was discharged from active military service, his malpractice claim regarding the VA doctors' 1989-1990 diagnosis and treatment of his injury—unlike his claim that he was incurred by exposure to Agent Orange while on active duty in Vietnam from 1967-1970—is not barred by Feres. See United States v. Brown, 348 U.S. 110, 110-12 (1954) (VA hospital's negligence during operation on knee on discharged veteran, which was incurred during active military service, was not incident to military service and thus not barred by Feres).

Accordingly, we affirm the dismissal of the Paynes' challenge to the VA's denial of their disability benefits, reverse the dismissal of their malpractice claims, and remand for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT

FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ALLEN PAYNE *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 01-0575-CV-W-NKL
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY

JUDGMENT WITH SUPPORTING SUGGESTIONS

Respectfully submitted

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IN THE UNITED STATES DISTRICT COURT FOR

THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

ALLEN PAYNE *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Case No. 01-
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITH SUPPORTING SUGGESTIONS

Defendant United States of America moves this Court to enter its order granting summary Judgment in favor of Defendant for the following reasons:

1. Plaintiffs' civil action is barred by the two year statute of limitation applicable to actions filed under the Federal Tort Claims Act ("FTCA").

2. Summary judgment should be granted on Allen Payne's civil action because he

can submit no expert medical opinion that any Department of Veterans Affairs "VA") physician violated the applicable standard of care in diagnosing and treating Plaintiff's skin condition.

3. Debra Payne's civil action is subject to dismissal

because it is derivative of her husband's alleged claim.

In support of this motion Defendant submits the following suggestions and the attached records of Plaintiff Allen Payne.

SUGGESTION IN SUPPORT

Background Regarding Plaintiffs' Claims

Plaintiffs Allen and Debra Payne ("the Paynes") filed

their pro se civil complain on

June 1, 2001. In an order dated April 30, 2002 this Court granted Defendant's Motion to Dismiss the various claims asserted by the Plaintiffs. In an order dated March 18, 2003 the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of the Paynes' challenge to the VA's

denial of their disability benefits but reversed the dismissal of the Paynes' malpractice claims and remanded the case for further proceedings. In deciding to remand the case regarding Plaintiffs' malpractice claims the Eighth Circuit panel stated that "the existing record does not establish whether Allen exercised reasonable diligence in discovering the probable cause of his injury, and this issue remains open on remand."

Statement of Undisputed Facts

1. On November 15, 1989, Mr. Payne presented to the St. Louis Veterans Administration Medical Center ("VAMC"), John Cochran Division, for an outpatient visit. Mr. Payne's chief complaint was a rash on the trunk of his body which had persisted over the preceding two months. He was given a dermatology consult and did subsequently present to the St. Louis VAMC Dermatology Clinic on December 27, 1989. Certified copy of Allen Payne's VA medical records **(Exhibit ("Ex.")4)** pp.40-41.

2. The consultation sheet for the December 27, 1989, visit indicates a five-month history of pruritic (itching) truncal eruption which was not preceded by an illness. Also noted was the absence of a dermatological condition in the past. Under the Assessment/Plan part of the dermatology consult, the following remarks appear: "Papular eruption of unknown etiology.

'Loose nature of skin in affected areas suggestive of anetoderma or other connective tissue process, though eruptive nature and distribution very atypical. Return to clinic in one week, at 0730 with Dr. Eisen." (Ex.4, p.41).

3. On January 3, 1990, Mr. Payne returned to the St. Louis VAMC Dermatology Clinic. He was initially examined by dermatology resident, Dr. Karen E. Forsman. Dr. Forsman worked under the supervision of Dr. Arthur Z. Eisen. During this visit Dr. Forsman noted a 6-7 month history of generalized truncal eruption, mildly pruritic. Additionally during this visit, a "punch" biopsy was performed to obtain a pathological assessment of the affected area. (Ex. 4, pp. 44-43). The pathology diagnosis was "punch biopsy skin from left flank-consistent with connective tissue nevus, no evidence of granulomatous process." (Ex. 4, p. 39)

4. The *Dorland's Medical Dictionary* 1135 (28th ed. 1994), defines nevus as

"a type of hamartoma [a benign tumor-like nodule composed of an overgrowth of mature cells and tissue that normally occur in the affected part] representing a circumscribed stable malformation of the skin which is not due to external causes and therefore presumed to be of hereditary origin. The excess (or deficiency) of tissue may involve epidermal, connective tissue ... elements."

5. Granuloma is defined by the *Dorland's Medical Dictionary* 716 (28th ed. 1994) as "an imprecise term applied to any small nodular aggregation of mononuclear inflammatory cells ... Granuloma formation represents a chronic inflammatory response initiated by various infections and noninfectious agents."

6. Dr. Forsman specifically annotated the January 3, 1990 note with "Return to Clinic in 2 weeks. To see Dr. Eisen 7:30 a.m." (Ex 4, p. 44)

7. On January 17, 1990, Mr. Payne returned to the Dermatology Clinic.

Dr. Forsman's note acknowledges the pathology findings and further states: "Biopsy site healing well. Suture removed. Ash leaf macule noted on right chest. Discussed case with Dr. Eisen. Possibly from tuberous sclerosis with connective tissue nevi and ash leaf macule. Unlikely

however as patient is otherwise normal; 3 children normal. No other family members involved. Return to Clinic 4 month for recheck." (Ex. 4, pp. 43-44).

8. Mr. Payne's next scheduled appointment for the Dermatology was May 18, 1990. Mr. Payne, however cancelled this appointment. (Ex. 4, p. 45; Payne Deposition ("Dep."), p. 11).

9. Following this cancellation there is no VA medical record addressing Mr. Payne's skin condition between May 18, 1990 , and Dr. Karen Zanol's VA Compensation and Physical (C&P) Examination on November 2, 1998. (Ex 4, p. 34-36).

10. Mr. Payne did not seek any medical care regarding his skin condition between his last visit to the Dermatology Clinic in January 1990 and November 1998. (Payne Dep., p. 12).

11. Mr. Payne testified that Dr. Eisen recommended to the Plaintiff that he use an over the counter soap (Neutrogena) in order to help stop the itching that he was experiencing. (Payne Dep., p. 9).

12. In February 1991, Mr. Payne filed a claim for veterans benefits due to his skin condition. **(Exhibit 5).**

13. In an effort to support his claim for benefits Allen Payne submitted a statement on April 1, 1991, which stated in part as follows:

> I Allen Payne entered the Veterans Administration Hospital on Grand Ave, for Agent Orange Exposure on 12-27-89, and was seen by V.A. Doctors for a rash that has been on my body from waist upward front and back, since my return from Vietnam. I returned on 3 different occasions for review on this rash at V.A. Hospital but there was nothing like this before ever. Therefore I am stuck with this body rash and can do nothing about it. The only thing the V.A. Hospital did was give me some Soap to stop the itching. However this Soap has no effect on the rash. The only thing that was said to come back from time to time to let them look at it.

(Exhibit 6).

14. On one occasion in 1998 the Plaintiff had his skin condition examined by a private physician. (Payne Dep., pp. 12-13).

15. The only documented Mr. Payne has produced regarding this visit is on September 14, 198, letter from Dr. John Hall, Kansas City, Missouri, dermatologist. In this letter, Dr. Hall states: "A lesion from his right back was taken for skin biopsy on that

day [August 26, 1998] and found to be anetoderma. From past history, I do feel it's possible that exposure to Agent Orange, while in Vietnam could have given him chloracne, which in turn could have given him anetoderma. Chloracne is a proven side affect of Agent Orange use. **(Exhibit 7).**

16. Mr. Payne testified that Dr. Hall gave the Plaintiff a skin cream that was not effective. (Payne Dep., pp. 1-14).

17. Dr. Hall's letter lead to a C&P examination with VA dermatologist, Dr. Karen Zanol, on November 2, 1998. In her Assessment and Plan, she noted: "Wide spread anetaderma biopsy proven. This is a post-inflammatory form that can be caused by acne from eruptions such as chloracne which could have been a predisposing condition in this veteran. Plan: I would give him triamcinolone 0.025 percent cream in a one pound jar to use for his itching." (Ex. 4, p. 36).

18. The Plaintiff has not seen any physician regarding his skin condition since his appointment with Dr. Zanol. Plaintiff receives the skin cream prescribed to him by mail. (Payne Dep., p. 15).

19. Mr. Payne only saw Dr. Hall on one occasion and has only talked to him

since that visit on one occasion to ask for the letter identified as Exhibit 7. (Payne Dep., p. 14).

20. Allen and Debra Payne filed administrative tort claims with the VA on January 14, 2999 and March 7, 2000. **(Exhibits 2 and 3)**.

21. The Payne's claims were denied after a request for reconsideration on May 23, 2001. **(Exhibit 1).**

Argument

PLAINTIFFS' CIVIL ACTION IS BARRED BY THE FTCA's TWO YEAR

STATUTE OF LIMITATIONS.

Allen Payne is apparently claiming that Dr. Arthur Eisen somehow committed medical malpractice by not curing Plaintiff's skin condition in 1990. The Plaintiff last saw Dr. Eisen in early 1990.The

Plaintiff skipped his last appointment and sought no further medical treatment for his skin condition until 1998. The Defendant submits that the Paynes tort claims are untimely. The Eighth Circuit has stated as follows:

> An action may not be commenced in federal court under the FTCA unless the plaintiff has first presented his claim to the appropriate federal agency, and that claim has been denied. *See 28* U.S.C. ξ 2675(a). Further, "[a] tort claim against the United States Shall be forever barred unless it is presented in writing to the appropriated Federal agency within two years after such claims accrues ...." 28 U.S.C. ξ 2401(b). A plaintiff's compliance with the two-year limitations period is a jurisdictional prerequisite, since the FTCA acts as a waiver of the federal government's sovereign immunity. *See Walker v. United States,* 176 F.3d 437, 438 (8th Cir. 1999).

McCoy v. United States, 264 F.3d 792, 794 (8th Cir. 2001). In addition, "[t]he Supreme Court has held that an FTCA claim for medical malpractice accrues when a plaintiff becomes aware of his injury and its probable cause." *Id. (citing United States v. Kubrick*, 444 U.S. 111, 122 (1979)).

"Accrual occurs at that point even it the injured person does not know that the injury is legally redressable." *Knudsen v. United States*, 254 F.3d 747, 751 (8th Cir. 2001) (citing *K.E.S. v. United States*, 38 F.3d 1027, 1030 (8th Cir. 1994)).

In this case the Eighth Circuit remanded the Paynes civil action to this Court after dismissal because it found that the record did not "establish whether Allen [Payne] exercised reasonable diligence in discovering the probable cause of his injury." (Order of March 18, 2003). The medical evidence does not indicate that anyone who has treated the Plaintiff for his skin condition has ever actually "injured" the Plaintiff. Mr. Payne has an chronic untreatable skin condition and the doctors who have seen him have universally recommended soaps or creams to relieve the itching caused by his anetoderma. The skin cream Mr. Payne is currently using is apparently more effective than the skin cream previously suggested by Dr. Hall or the Neutrogena soap recommended in 1990.

In 1991 Mr. Payne expressed his opinion that the treatment provided by the VA in 1990 was unsuccessful. (Ex. 6). Further, Payne testified that Dr. Eisen told him in 1990 that the soap, recommended to relieve Payne's itching, would cure his skin condition. (Payne Dep., pp. 10-12). If, as Payne has testified, he believed that his skin condition was going to be cured, he should have become suspicious when the condition did not improve. "Although '[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, … such suspicious do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence.' *Kronisch v. United States,* 150 F.3d 112, 121 (2nd Cir. 1998)"; *Garza v. United States Bureau of Prisons*, 284 F.3d 930, 934 (8th Cir. 2001). Further, "a plaintiff's assertion of when he gained actual knowledge is not determinative if he did not act reasonably and, 'in effect, closed [his] eyes to evident and objective facts concerning accrual of [his] right to sue.' *See Chrysler*

Workers Association v. Chrysler Corporation, 834 F.2d 573, 579 (6th Cir. 1987)." *Garza*, 284 F.3d at 935.

Since the Plaintiff was dissatisfied with his treatment at least by 1991 and in light of the fact there was never any improvement in Plaintiff's condition, Plaintiff should have made further inquiry regarding appropriate treatment long before 1998. A reasonably diligent person would not cancel appointments and then fail to seek any treatment or medical care for eight years when he was receiving regular treatment from the VA for his mental condition. (See Ex. 4).

Defendant submits that this Court should conclude that Plaintiff's claim accrued in 1991 when he expressed dissatisfaction with the VA's treatment and it was evident that the skin condition was not being cured. Plaintiffs' tort claims were not filed until 1999 and 2000. Plaintiffs' civil action is therefore barred by 28 U.S.C. ξ 2401(b) which requires claims to be presented in writing to the appropriate federal agency "within two years after such claim accrues."

SUMMARY JUDGMENT SHOULD BE GRANTED ON ALLEN PAYNE'S CIVIL ACTION BECAUSE HE CAN SUBMIT NO EXPERT MEDICAL OPINION THAT ANY DEPARTMENT OFVETERANS AFFAIRS (VA") PHYSICIAN VIOLATED THE APPLICABLE STANDARD OF CARE IN DIAGNOSING TREATING PLAINTIFF'S SKIN CONDITION.

To make *a prima facie* negligence claim the Plaintiffs must prove the existence of a duty to be performed by the VA, a breach of the existing duty, and a resulting injury caused by the VA's breach of duty. *Krause v. United States Truck Company,* 787 S.W.2d 708, 710 (Mo. bane 1990). In a medical malpractice case, plaintiff must present sufficient evidence to establish first, a causal connection between the act or omission of the physician and the claimed injury; second, proof that the act or omission was negligently performed; and third, proof that the physician failed to meet the requisite standard of care. *Cebula v. Benoit,* 652 S.W.2d 304, 307 (Mo. App. 1983); *Mills v. Redington, M.D.,* 736 S.W.2d 522, 524 (Mo. App. 1987). It is well established under Missouri

law that expert testimony generally must be introduced to establish the standard of care in a medical negligence case. *Dine v. Williams,* 830 S.W.2d 453, 456 (Mo. App. 1992); *Ladish v. Gordon, D.O.,* 879 S.W.2d 623, 628 (Mo. App. 1994).

Thus in order to establish his *prima facie* case. Allen Payne bears the burden of proving that Dr. Eisen failed to exercise that degree of skill and learning ordinarily exercised by members of his profession under the same or similar circumstances in treating his condition. *Cebula v. Benoit,* 652 S.W.2d at 307. Additionally, Payne must show that the VA doctor's negligent act or acts cause her resulting pain and suffering. *Swope v. Prince,* 468 S.W.2d 34, 39 (Mo. 1971). To make a submissible case of medical malpractice the Plaintiffs must establish by expert opinion that the VA physicians failed to use that degree of skill and learning ordinarily used by doctors under the same or similar circumstances and that the VA physicians negligence caused the injury to Allen Payne. *See Washington v.*

Barnes Hospital, 897 S.W.2d 611, 615 (Mo. Banc 1995); *Brooks v. SSM Healthcare,*

73 S.W.Sd 686. 692 (Mo. App. 2002).

It is very clear that the Plaintiffs have no expert witness who is going to testify that any VA physician has violated the applicable standard of care in diagnosing or treating Alien Payne. Although Mr. Payne has listed Dr. Hall, who he visited with in 1998, as a witness, Mr. Payne has testified that he has not talked with Dr. Hall or seen Dr. Hall since 1998. (Payne Dep., pp. 14-15). Dr. Hall's letter to the VA indicating that he thought the Plaintiffs anetoderma might be a result of chloracne possibly caused by Agent Orange makes no comment one way or the other regarding Plaintiffs previous treatment. In fact Dr. Hall's treatment was very similar to the treatment provided by the VA. The Plaintiff was given a lotion to spread on his body to help with the itching. The VA had previously recommended a specially formulated soap for the same purpose.

No physician ever consulted by Allen Payne regarding his skin condition has suggested anything other than measures to reduce Plaintiffs discomfort. Without an expert opinion Plaintiff cannot establish *a prima facie* case of medical malpractice against Dr. Eisen or the VA. Consequently, summary judgment should be granted in favor of the Defendant regarding Alien Payne's claim and Mrs. Payne's claim for damages due to a lack of consortium. Mrs. Payne's claim is obviously derivative of her husband's cause of action.

Conclusion

Based upon the foregoing Defendant respectfully requests that this Court enter its order granting summary judgment in favor of Defendant and against Allen and Debra Payne.

Respectfully submitted,

Todd P. Graves United States Attorney

By */s/ Jerry L. Short*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Defendant's Motion for Summary Judgment With Suggestions in Support** was electronically filed with the Court and mailed or e-mail notices sent this 15th day of December, 2003, to the following:

Allen and Debra Payne
6140 North Hull
Kansas City, Missouri 64151

/s/

Jerry L. Short
Jerry L. Short

Assistant United

Mr. Mrs Allen Payne

May 29, 2005